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Can Violating a Work Rule Make You a Criminal?

Every workplace has its own rules regulating employee behavior. Some have formal progressive discipline policies calling for increasingly serious punishment for repeated instances of unacceptable behavior. While deviations from employment policies routinely result in discipline or even discharge, it is universally understood that violating a work rule does not make an employee a criminal. Prosecutors, however, continue to rely on alleged violations of workplace rules as the premise for bringing criminal charges against employees in both the public and private sectors.[1] The theory is that workplace rules establish expected standards of conduct and, when those standards are breached, the employer is defrauded or suffers a theft.

But work rules are not crimes. And *Skilling* firmly closed the door on the attempt to criminalize employee breaches of the duty of faithful and loyal service.[2] Moreover, because there is no warning that departures from employment policies may subject employees to criminal punishment, basing criminal charges on those policies violates the due process guarantee of fair notice. In addition, as breaches of employment policies are common and routinely result in no discipline at all, empowering prosecutors to determine which policy violations warrant criminal prosecution invites selective enforcement and abuse of government power.

Simply stated, Congress — not an individual's boss — determines what conduct deserves criminal punishment. The government should not be allowed to turn employee misconduct into a federal offense. This article explores the history of federal prosecution of work rule violations and offers defense strategies for challenging the misuse of workplace rules as a basis for criminal prosecution against public and private sector employees.

The Rise and Fall of Honest Services Fraud

The criminalization of workplace misconduct has its origins in the tortured history of the honest services theory of mail fraud.

The "go to" statute for federal prosecutors has long been the mail fraud statute.[3] As originally enacted in 1872, the statute proscribed use of the mails to advance "any scheme or artifice to defraud."[4] The intent was to protect the post office from fraudulent interstate lottery schemes.[5] In 1909, Congress codified the Supreme Court's decision in *Durland* that the mail fraud statute protects property rights[6] and amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises."[7] The same language appears in the wire fraud statute,[8] and schemes charged under the mail fraud and wire fraud statutes are subject to the same analysis.[9]

Subsequent court decisions endorsed the notion that deprivation of the honest and faithful services owed by a fiduciary is the equivalent of fraudulent taking and therefore constitutes a scheme to defraud within the meaning of the mail and wire fraud statutes.[10] The *Shushan* case from

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the Fifth Circuit is credited with giving rise to the honest services theory in 1941.[11] The defendant in *Shushan* was a public official who allegedly accepted bribes from entrepreneurs in exchange for urging official city action that was beneficial to the bribe payers. The defendant in *Shushan* argued that there was no fraud since the city realized cost savings from the project. The Fifth Circuit disagreed and held that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public."[12]

The honest services doctrine cultivated in *Shushan* solved a thorny problem for prosecutors unable to establish that the victim of the alleged fraud suffered a loss of money or property. Unlike traditional fraud in which the victim's loss of money or property supplies the defendant's gain, the honest services theory targeted corruption that results in no tangible loss to the victim. For example, consider a situation in which an employee accepts a payment from a third party in exchange for awarding that party a contract, yet the contract terms are the same as any that could have been negotiated at arm's length.[13] The honest services theory came to be applied broadly to a wide variety of public and private sector breaches of loyalty. Public officials were convicted of defrauding citizens of the right to the honest services where they made governmental decisions with the secret objective of benefitting themselves or promoting their own interests or used the mails or wires to falsify votes that resulted in the officials being elected. In the private sector, purchasing agents, brokers, union leaders and others with fiduciary duties to their employers or unions were found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information.[14]

In 1997, the Supreme Court in *McNally* "stopped the development of the intangible-rights doctrine in its tracks" by declaring that the statute applies only where money or property rights are at issue.[15] The defendant in *McNally* was a state official who arranged with a state contractor for the payment of kickbacks to companies that the official partially controlled.[16] The state did not pay a higher price or secure less favorable terms as a result of the kickback scheme. Instead, the prosecutor maintained that the kickback scheme "defraud[ed] the citizens and government of their right to have the Commonwealth's affairs conducted honestly." The Supreme Court rejected the government's honest services theory and held that the mail fraud statute reaches only schemes designed to deprive victims of money or property and not intangible rights "such as the right to have public officials perform their duties honestly."[17]

In the wake of *McNally*, and in an effort to limit its effects, prosecutors attempted to characterize the salary paid to employees as the "money or property" required for a mail or wire fraud conviction. The "salary theory" of mail fraud originated from the suggestion by Justice Stevens in his dissent in *McNally* that a deprivation of the right of honest services also constitutes a deprivation of money or property when an employee's salary is at issue. Justice Stevens wrote:

> When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer — who is not getting what he paid for. … This … may fulfill the Court's "money or property" requirement. …[18]

The "salary theory" was not endorsed by a majority of the Court and has since been rejected as a basis for pursuing mail fraud charges on the grounds that the property interest that is alleged to have been denied — the salary — is indistinguishable from the intangible right to honest services described in *McNally*.[19]

In 1988, Congress reinstated the honest service theory by enacting 18 U.S.C. § 1346.[20] Section 1346 provides that the phrase "scheme or artifice to defraud" in the mail and wire fraud statutes includes "a scheme or artifice to deprive another of the intangible right of honest services." As before *McNally*, the honest services statute came to be used by federal prosecutors to pursue public corruption as well as breaches of fiduciary duty and corporate fraud by public and private employees.

In 2010, the Supreme Court once again narrowed the scope of the honest services statute in *Skilling*. The defendant in *Skilling* argued that § 1346 was unconstitutionally vague because the phrase "intangible right to honest services" did not adequately define the conduct proscribed by the provision and the language was so broad that it allowed for arbitrary prosecutions.[21] The Supreme Court agreed and held that § 1346 can only be read as criminalizing bribery and kickback schemes. The Court specifically rejected the government's argument that the statute should be read more broadly to include "undisclosed self-dealing by a public official or private employee — i.e., the taking of official action by the employee that furthers his own undisclosed financial interest while purporting to act in the interests of those to whom he owes a fiduciary duty." The Court held that "a reasonable limiting construction of § 1346 must exclude this amorphous category of cases."[22]

Skilling Precludes Criminalization of Work Rules

Straightforward application of *Skilling* bars prosecutors from using the mail fraud statute to transform violations of work rules into federal offenses. When prosecutors accuse employees of violating an obligation imposed by their employer, they are charging a breach of the duty of faithful and honest service. Failing to adhere to established work rules is no different from the breach of fiduciary duty deemed insufficient to give rise to criminal liability in *Skilling*. Both are premised on the dishonest performance of a work duty — action by an employee that furthers his own personal financial or other interests in violation of a duty owed to the employer. *Skilling* makes crystal clear that employers can no longer base criminal charges on such acts of disloyalty absent bribes or kickbacks. Thus, violation of a workplace rule, by itself, is not punishable under the mail or wire fraud statutes.

Any comfort that prosecutors may derive from the *Carpenter*[23] decision is illusory. The defendant in *Carpenter* was a *Wall Street Journal* reporter who was charged with securities fraud and mail and wire fraud for providing confidential prepublication information to his co-conspirators who bought and sold stocks based on the information and then shared the profits with him.[24] The defendant argued that his conduct in revealing the prepublication information "was no more than a violation of workplace rules" and did not amount to a scheme to defraud the *Journal* of money or property as required by *McNally*.[25] The Supreme Court rejected this argument and found that criminal liability was not premised on the defendant's breach of fiduciary duty but rather the fraudulent appropriation of the *Journal*'s confidential information.[26] Since confidential business information satisfies the definition of money or property, the conspiracy to trade on the *Journal*'s confidential information was within the reach of the mail and wire fraud statutes.[27]

Carpenter merely interprets *McNally* and cannot fairly be read as endorsing the

criminalization of work rules. In any event, the more recent decision in *Skilling* puts to bed the notion that an employee commits fraud when he violates a fiduciary or other duty owed to his employer.

This is not to say that a mail or wire fraud charge is never appropriate in the workplace setting. If, for example, a job applicant submits via the U.S. mail a false certification that he possesses a necessary job qualification and the employer is deceived into hiring the applicant based on the false representation, the job that he obtained may be considered property and the false certification may supply the scheme or artifice to defraud necessary for a mail or wire fraud prosecution. This was the rationale for affirming the convictions of city officials who awarded jobs on the basis of political support notwithstanding a prohibition against patronage hiring practices in *Sorich* and *Del Valle*.[28] The culpable conduct in these cases was the false representation — not the breach of an accepted work rule.

Put simply, without some deprivation of money or property resulting from a fraudulent representation, a work rule violation cannot be prosecuted as fraud.[29]

Treating a Work Rule as a Crime Violates Due Process

Basing a criminal prosecution on an alleged violation of a work rule is a plain violation of due process. The problem is that employees are given no notice that their conduct may subject them to criminal penalties. It has long been recognized that "a criminal statute must give fair warning of the conduct that makes it a crime."[30] Justice Holmes explained:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.[31]

There are three manifestations of the fair warning requirement.[32] First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[33] Second, the rule of lenity ensures fair warning by resolving ambiguity in a criminal statute in favor of the accused.[34] Third, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.[35] In each case, the touchstone is whether the statute at issue made reasonably clear that the defendant's conduct was criminal.[36]

When it comes to workplace rules, there is nothing in Title 18 or anyplace else that puts employees "on notice" that a violation of those rules can turn employees into criminals.

Employment policies do not warn employees that they may be exposed to criminal punishment if they depart from their employer's directives. Rather, employee handbooks routinely state that violations will result in discipline "up to and including dismissal." Many employers have progressive discipline policies that provide for increasingly serious penalties for repeated violations (verbal warning, written warning, suspension and then termination), but criminal punishment is never mentioned. Even employee handbooks that expressly reserve to employers the right to report illegal activity (for example, theft of employer funds or possession of illegal drugs) to law enforcement do not put employees on notice that they may face criminal punishment if they violate work rules that do appear in the criminal code.[37]

Furthermore, employees have no way of knowing which conduct tips the scale from an internal employee disciplinary matter to a crime. For example, if an employment policy prohibits the use of company equipment for non-business-related reasons, does an employee commit a crime whenever he or she makes a personal phone call or sends a personal email? Or does the conduct have to be regular and pervasive to allow for prosecution? Where is the breaking point? Does the employer have to suffer an economic loss for it to be a crime? How can employees tell the difference between what can get them fired and what might result in incarceration?

Most importantly, basing criminal charges on employee handbooks improperly delegates to employers the authority to delineate conduct that may be deemed criminal. This cannot be squared with the U.S. system of government that empowers Congress with the exclusive authority to "determin[e] what types of activities are so morally reprehensible that they should be punished as crimes."[38]

Allowing Prosecutors to Decide Which Violations To Prosecute Invites Arbitrary Enforcement

When Congress fails to clearly identify the type of conduct that may give rise to criminal punishment, prosecutors have license to pursue their own personal predilections. This is the real danger in allowing prosecutors to criminalize violations of work rules. It is particularly distressing when the employee is a public official because pursuit of criminal charges against the official may end up altering the outcome of a legitimate election.[39]

It goes without saying that workplace rules are routinely broken. That is the reason employers have progressive discipline policies that impose increasing punishment for repeated violations. Some employer directives are ignored even by employers. Personal dalliances during the workday — for example, running a personal errand or shopping online for personal items — are generally forbidden but employees are rarely disciplined for occasional deviations from their work. Similarly, use of an employer's equipment to make personal phone calls or send personal emails may be prohibited by computer-use policies, but employees are almost never disciplined when they make periodic use of work equipment for personal purposes. Therein lies the problem: giving prosecutors the discretion to determine which of these common occurrences to prosecute as crimes.

The risk of arbitrary prosecution prompted the Ninth Circuit to strike the government's interpretation of the federal Computer Fraud and Abuse Act (CFAA) that based criminal liability on violations of an employer's computer-use policy in *United States v. Nosal*.[40] The defendant in *Nosal* was charged with violating the criminal provisions in the CFAA[41] when he downloaded information from his employer's computer and took it with him to his new place of employment in violation of computer-use restrictions implemented by his employer. In an *en banc* decision, the Ninth Circuit concluded that the CFAA could not be construed to criminalize conduct that was prohibited by the employer's policy. The court observed that "[s]ignificant notice problems arise if we allow criminal liability to turn on the vagaries of private policies" and that "[b]asing criminal liability on violations of private computer-use policies can transform whole categories of otherwise innocuous behavior into federal crimes. ..."[42] Explaining that employees routinely use their employer's computer

equipment for personal purposes notwithstanding policies prohibiting such use and that "[u]biquitous, seldom-prosecuted crimes invite arbitrary and discriminatory enforcement," the *Nosal* court affirmed the dismissal of the criminal charges premised on violation of the computer-use policy.[43] While there is currently a split among the circuit courts concerning the proper interpretation of the CFAA,[44] the trend has been in favor of the narrow interpretation endorsed by the Ninth Circuit in *Nosal*.

The reasoning in *Nosal* applies broadly to any attempt to criminalize work rules. Allowing prosecutors to decide when workplace misconduct is a crime exposes employees everywhere to arbitrary and discriminatory prosecution.

Equating a Work Rule Violation With a Scheme To Defraud Alters the Traditional Balance

The Supreme Court in *Cleveland* rejected the government's interpretation of the mail fraud statute that equated the issuance of licenses or permits with deprivation of property because there was no "clear statement" from Congress that the statute was meant to apply to licenses and permits.[45] The Court was persuaded that the government's sweeping interpretation "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities."[46] Regulating workplace behavior is even more removed from the situation in *Cleveland* since this is a matter traditionally left to employers, not the state or federal government. Absent a "clear statement" from Congress, there is no justification to disrupt the existing balance.

Conclusion

It is debatable whether Congress can draft legislation that (1) makes it a crime for an employee to violate a work rule imposed by his employer *and* (2) passes constitutional muster. Unless and until it does so, enforcement of workplace rules must be left to employers.

Notes

1. Most recently, the U.S. Attorney for the Northern District of Indiana brought wire fraud charges against a local elected official for allegedly assigning his staff to assist in his political campaign in violation of employment policies contained in the employee handbook of Lake County, Indiana. *United States v. Van Til*, No. 2:13-CR-00068-JTM-PRC-1 (N.D. Ind. filed May 17, 2013).

2. *Skilling v. United States*, 130 S. Ct. 2896,

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177 L. Ed. 2d 619 (2010).

3. Jed S. Rakoff famously referred to the relationship between federal prosecutors and 18 U.S.C. § 1341 as follows: "To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart — and our true love." Jed S. Rakoff, "*The Federal Mail Fraud Statute (Part I)*," 18 Duq. L. Rev. 771, 771 (1980).

4. *Skilling,* 130 S. Ct. at 2926; *McNally v. United States*, 483 U.S. 350, 356, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987).

5. Peter J. Henning & Lee J. Radek, The Prosecution and Defense of Public Corruption: The Law and Legal Strategies 8-9, 145-46 (2011).

6. *Durland v. United States*, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896).

7. *Skilling*, 130 S. Ct. at 2926.

8. 18 U.S.C. § 1343.

9. *Carpenter v. United States*, 484 U.S. 19, 25 n.6, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis.").

10. Henning & Radek, *supra* note 5, at 152.

11. *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941).

12. *Id.* at 115.

13. *Skilling*, 130 S. Ct. at 2926.

14. For a comprehensive citation to the variety of contexts in which the honest services theory was applied pre-*McNally*, see the dissenting opinion of Justice Stevens in *McNally*. *McNally v. United States*, 483 U.S. 350, 363-64 & nn.1-4, 107 S. Ct. 2875, 2883-84, 97 L. Ed. 2d 292 (1987) (Stevens, J., dissenting).

15. *Skilling*, 130 S. Ct. at 2927.

16. *McNally*, 483 U.S. at 360, 107 S. Ct. at 2877-78.

17. *Id.* at 358, 107 S. Ct. at 2881.

18. *Id.* at 377 n.10, 107 S. Ct. at 2891 (Stevens J., dissenting).

19. *See, e.g., United States v. Ratcliff,* 488 F.3d 639 (5th Cir. 2007) (affirming dismissal of mail fraud charges premised on alleged scheme to obtain salary and employment benefits of elected office through election fraud since scheme did not involve money or property rights within meaning of statute); *United States v. Turner*, 465 F.3d 667, 1013 (6th Cir. 2006) (vacating mail fraud conviction based on alleged election fraud and explaining that "the salary theory does not fall within the scope of a scheme to obtain money or property"); *United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989) ("the property interest alleged to have been denied the victim here — what the government contends Hillsborough County paid salaries for but did not get — is the 'honest and faithful services' of the county commissioners, an interest McNally held to be unprotected by the mail fraud statute"); *United States v. Collier*, 2009 WL 88383, 2009 U.S. Dist. LEXIS 1670, *3 (M.D. Ga. Jan. 12, 2009) ("[S]aying, as the indictment does, that [the defendant] retained his salary while engaging in such dishonest conduct is the same as saying that [the defendant] made decisions based on interests other than those of the public. … Despite the use of the word 'money' in reference to [the defendant] maintaining his salary, the allegations are nothing more than allegations of intangible acts of defrauding the public of honest services."); *but see United States v. Johns*, 742 F. Supp. 196, 205 (E.D. Pa. 1990) (refusing to dismiss mail fraud charge premised on salary and benefits paid to employee for loyal, faithful, and honest services free from conflict of interest).

20. *Skilling*, 130 S. Ct. at 2927.

21. *Id.* at 2927-28.

22. *Id.* at 2932.

23. *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987).

24. *Id.* at 27, 108 S. Ct. at 321.

25. *Id.*

26. *Id.*

27. *Id.* at 28, 108 S. Ct. at 321-22.

28. *See Sorich v. United States*, 709 F.3d 670, 675-78 (7th Cir. 2013); *United States v. Del Valle*, 674 F.3d 696, 704 (7th Cir. 2012), *cert. denied sub nom. Sanchez v. United States*, 133 S. Ct. 839, 184 L. Ed. 2d 652 (2013).

29. *See, e.g., United States v. Thompson,* 484 F.3d 877 (7th Cir. 2007) (reversing mail fraud conviction based on state employee's failure to adhere to procurement rules).

30. *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

31. *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931).

32. *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997).

33. *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

34. *Id.* (citations omitted).

35. *Id.* (citations omitted).

36. *Id.* at 267, 117 S. Ct. at 1225.

37. *See generally Thompson,* 484 F.3d at 882-84 (reversing mail fraud conviction based on failure to adhere to procurement rules absent clear statement from Congress).

38. *United States v. Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988); *see also United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

39. This prospect should be especially alarming to defense counsel given the Second Circuit's recent pronouncement that the government should be afforded "significant flexibility" in its statutory interpretation in public corruption cases. *See United States v. Rosen,* 716 F.3d 691, 701 (2d Cir. 2013).

40. *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).

41. 18 U.S.C. § 1030.

42. *Nosal*, 676 F.3d at 860.

43. *Id.* at 860.

44. The First, Fifth, and Eleventh Circuits endorse a broad reading of the CFAA that would criminalize employee violations of employer computer use and confidentiality policies. *See, e.g., United States v. Rodriguez*, 628 F.3d 1258, 1260 (11th Cir. 2010); *United States v. John*, 597 F.3d 263, 271-72 (5th Cir. 2010); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 581-82 (1st Cir. 2001). The Fourth Circuit and a number of district courts endorse the narrow theory espoused in *Nosal*. *See, e.g., WEC Carolina Energy Solutions, LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012); *Dresser-Rand Co. v. Jones*, Civil Action No. 10-2031, 2013 WL 3810859 (E.D. Pa. July 23, 2013); *JBCHoldings NY, LLC v. Pakter*, No. 12 Civ. 7555(PAE), 2013 WL 1149061, *5 (S.D.N.Y. Mar. 20, 2013).

45. *Cleveland v. United States*, 531 U.S. 12, 24, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000).

46. *Id.* ■

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